

Precedential Value

Federal Public Defender's Office, Southern District of Ohio

Deborah L. Williams, Federal Public Defender
Editors: Richard Monahan & Jacob Cairns

Issue #75 November-December 2019

This publication is an outline of selected published cases from the Supreme Court and Sixth Circuit that may impact the practice of federal criminal law in the courts of the Sixth Circuit. Cases may be accessed electronically by clicking on any case name, which is hyperlinked to the court's official website. A combined outline of all cases published in Precedential Value since January 2015 may be found on our website at www.fpd-ohs.org, under the Precedential Value tab.

I. Sentencing Issues

A. 3553(a) factors and issues

Procedural Reasonableness

U.S. v. Aguilar-Calvo, 19-5278 (12/16/19)

The defendant was convicted of illegal reentry into the U.S. by a deported alien. The government argued at sentencing that a higher sentence was warranted because a certain segment of society wanted more secure borders because illegal aliens were taking their jobs. On appeal, the court held that the government's argument was "blatantly inappropriate." The court found that the government provided no factual support for its argument but instead relied on an "unsubstantiated belief" that many people want our borders secured because of immigrants competing for jobs and social services. Further, the court found that the government had not identified any specific community that was harmed by this tenuous theory, nor did the government tie its theory to any "unlawful harm" caused by the defendant. Nonetheless, the court found that the district court did not rely on the government's improper argument at the sentencing hearing, and thus the court found no procedural error.

B. Guideline issues

3A1.1(b) – Vulnerable Victim – Child Porn

U.S. v. Nichols, 18-6285 (11/21/19)

At the defendant's sentencing for child pornography offenses, the district court determined that the defendant possessed images involving bondage of minor children, and that he possessed child pornography related to infants and toddlers. As such, the district court applied a 4 level enhancement under USSG § 2G2.2(b)(4)(A) for sadistic conduct related to the bondage, and a 2 level enhancement under USSG § 3A1.1(b)(1) for vulnerable victim related to the infants and toddlers. On appeal, the defendant argued that the vulnerable victim enhancement was not applicable because a 2016 amendment to USSG § 2G2.2(b)(4)(B) specifically added "sexual abuse or exploitation of an infant or toddler" as a basis for applying the 4 level enhancement. The court held that application of both the 4 level enhancement for sadistic images and a 2 level enhancement for vulnerable victim was appropriate. The court found that, in a case where images of bondage and images of infants or toddlers are present, the guidelines instruct that a district court apply both enhancements in calculating the sentence. As such, the defendant's sentence was affirmed.

D. Recidivism enhancements

18 USC § 924(e) – ACCA

U.S. v. Wooden, 19-5189 (12/19/19)

Upon his conviction for being a felon in possession of a firearm, the defendant was classified as an armed career criminal based on his prior 10 burglary convictions from Georgia. The defendant argued on appeal that the 10 convictions should not count separately because they were charged in one indictment and little information was provided about the details of the crimes. The court held that the burglaries were sufficiently considered to be “on occasions different from one another” for purposes of the ACCA. The court found that the indictment for the burglaries indicated that the defendant burglarized 10 different mini warehouses. The court ruled that each burglary would have its own location and that the defendant could have ceased his criminal conduct after the first offense and withdrawn without committing additional burglaries. As such, the burglaries were sufficiently separate and each qualified as an ACCA predicate. Thus, his sentence was affirmed.

18 USC § 2252(b)(1) – Repeat Sex Offender

U.S. v. Parrish, 18-3446 (11/1/19)

At the defendant’s sentencing for receipt of child pornography, the district court determined that he was a repeat offender based on his prior North Carolina conviction for indecent liberties with children. On appeal, the court held that the repeat offender provision of 18 USC § 2252(b)(1) was proper. The court ruled that, in order to be a qualifying offense under the statute, a prior need only “relate to” one of the listed sex offenses in § 2252(b). The court found that North Carolina’s indecent liberties with a minor was sufficiently related to the federal offense of abusive sexual conduct involving a minor. Therefore, the repeat offender enhancement applied and the 15 year sentence was affirmed.

III. Evidence

C. Article VIII – Hearsay

803(6) – Business Records

U.S. v. Smith-Kilpatrick, 18-1671 (11/7/19)

The defendant was charged with participating in a drug trafficking conspiracy. At trial, the government moved to admit business records from hotels, Western Union, car rentals, and cellular phones that included the defendant’s name. These records, when combined with the testimony of witnesses, supported the government’s theory that the defendant participated in the drug trafficking activities. The defendant argued on appeal that the records should not have been admitted under FRE 803(6)(E) because they were not trustworthy. The court held that, once the business records requirements have been established, the records are admissible unless the opponent can show through “specific and credible” evidence that the source of information or method of preparation lack trustworthiness. The court found that each of the records were proper business records, they were bolstered by witness testimony that the defendant was involved, and the defendant provided no specific or credible reasons to establish that the records were not trustworthy. Accordingly, admission of the evidence was affirmed.

IV. Fourth Amendment

D. Consent Searches and Seizures

U.S. v. Wooden, 19-5189 (12/19/19)

Undercover agents were seeking a wanted fugitive and had reason to believe he was at the defendant’s home. As a result, the agents knocked on the door, and the defendant answered. Without identifying themselves as officers, they asked the defendant if they could speak with his wife. The defendant went to get her, and the officers asked if they could wait inside to stay warm. While inside, the officers

saw the defendant possess multiple firearms. The defendant was subsequently charged with being a felon in possession of a firearm and he moved to suppress the evidence, claiming that he did not consent to the officers entering his residence. The motion was denied and the defendant appealed. The court first found sufficient evidence that the defendant consented to the entry. Second, the court held that consent was not invalidated because the officers failed to identify themselves. The court found that the officers made no misrepresentation or deception related to their identities, but merely remained silent as to their official positions. As such, the consent was not improperly obtained through deception. Because the defendant did not raise the deception issue in the district court, the court found no plain error in the district court's ruling.

E. Search Warrants

Probable Cause/Nexus

U.S. v. Crawford, 18-6239 (11/18/19)

An officer received information from an informant about the defendant's drug trafficking activities. Although the officer had never used the informant before, he verified from other officers that the informant was reliable. Based on this information, the officer obtained search warrants to track the defendant's phone and car, and then to search his house. In the ensuing prosecution, the defendant moved to suppress the evidence from all three warrants and the district court denied the motions. On appeal, the court held that the warrants were supported by probable cause. The court held that the officer's verification of the informant's reliability through other officers was sufficient for purposes of the probable cause analysis. The informant's reliability was also bolstered by the facts that the informant identified the defendant from his driver's license photo, the informant had cost information about the defendant's drug pricing, and the defendant had prior drug trafficking involvement. Further, the court found a sufficient nexus established between the drug

activity and the defendant's residence. The officer conducted a controlled purchase of drugs from the defendant before obtaining the warrant for his home, and the defendant was seen leaving his home before the drug transaction carrying the duffle bag in which the drugs were transported for the transaction. Because the nexus issue was not raised in the district court, this evidence was at least sufficient to survive plain error. Accordingly, the district court ruling was affirmed.

Good Faith/Consent

U.S. v. Parrish, 18-3446 (11/1/19)

The government obtained a search warrant to search a residence, including any computers and digital media. Although requested by the agents, the warrant did not include authorization to search persons on the premises. During the search, the agents questioned the defendant in their "mobile forensic lab" during which time he admitted that he had nude pictures of his minor daughter on his phone. He then consented to the agents' search of the phone, and child porn was discovered. The district court denied the defendant's motion to suppress the evidence, and he appealed. The court held that the good faith exception saved the search of the cellular phone. Even though the phone was on the defendant's person, the court held that the officers could have reasonably believed that the warrant authorized its search because the warrant allowed a search of "digital media," the defendant was at the residence, and the officers had actually requested to be able to search persons. Further, the court ruled that the defendant had consented to the search. The court found that the officers did not tell the defendant that the warrant authorized the search of his phone, but instead he voluntarily allowed them to search it after he admitted that it contained child porn. Accordingly, the court affirmed the district court's ruling.

V. Fifth Amendment

A. Prosecutor Conduct

Prosecutorial Misconduct

U.S. v. Crawford, 18-6239 (11/18/19)

During the defendant's trial for drug trafficking, the prosecutor had an officer vouch for the confidential informant's reliability. The defendant did not object to the testimony, but argued on appeal that it was improper. The court held that improper bolstering may occur where a prosecutor implies that a witness' testimony is corroborated based on evidence known to the government but not known to the jury. The court found, however, that the prosecutor had sufficiently required the witness to provide the underlying facts for his conclusion that the informant was reliable based on his own observations of the informant and those of fellow officers. As such, the court found no plain error and the conviction was affirmed.

D. Double Jeopardy

U.S. v. Foster, 18-5673 (12/17/19)

The defendant chose to represent himself during his trial for participating in a drug conspiracy. The prosecutor repeatedly elicited hearsay testimony from witnesses in violation of the Confrontation Clause. Because the defendant did not know to object to the testimony, the district court intervened and eventually granted a mistrial because of the repeated violations. Before the second trial, the defendant moved to dismiss the indictment based on the Double Jeopardy Clause. The district court denied the motion and, after a conditional plea, the defendant appealed. The court held that the question of whether double jeopardy applies to a mistrial ruling depends largely on which party requested the mistrial. Where a mistrial is based on a defendant's request, double jeopardy would only attach where the government provoked the defendant into a mistrial based on a fear of acquittal. The court found that, although the government committed

numerous "obvious constitutional violations," there was no evidence that the government intended to provoke a mistrial where "nothing challenging or even mildly unfavorable to the government's case occurred." Accordingly, no double jeopardy violation existed and the district court's ruling was affirmed.

E. Miscellaneous Fifth Amendment

Due Process – Vagueness

U.S. v. Parrish, 18-3446 (11/1/19)

The defendant was charged with receipt of child pornography and he challenged that the definition of "sexually explicit conduct" was unconstitutionally vague. The district court denied the motion and the defendant appealed. The court held that the phrase "lascivious exhibition of the genitals or pubic area of any person," while potentially ambiguous, was not so unduly vague as to fail to provide fair notice as to the type of conduct it prohibits. Thus, the district court's ruling was affirmed.

VI. Sixth Amendment

B. Confrontation Clause

U.S. v. Smith-Kilpatrick, 18-1671 (11/7/19)

Charged in a drug trafficking conspiracy, the defendant challenged the admission of business records from wire transfers, phone calls, car rentals, and hotel stays, based on the Confrontation Clause. Each of the records identified the defendant by name. The district court admitted the evidence and the defendant appealed. The court held that the Confrontation Clause was not violated by admission of the evidence. The court found that all of the records were properly admitted under the business records exception through a signed affidavit authenticating them and that, as business records from various companies, they were non-testimonial in nature. Thus, the Confrontation Clause did not preclude the admission of the

business records through sworn affidavits. As such, the district court’s ruling was affirmed.

XII. Specific Offenses

18 USC § 1425 – False Naturalization

U.S. v. Maslenjak, 14-3864 (11/21/19)

The defendant was charged with making false statements on her application for naturalization. At trial, the district court instructed the jury that materiality of the false statement was not an element of the offense. The defendant was convicted. The Supreme Court later reversed and held that materiality is an element of 18 USC § 1425. On remand to the Sixth Circuit, the court ruled that the erroneous jury instruction on materiality was not harmless in the case. First, the court found that, although the defendant clearly told a lie about whether her husband had served in the Bosnian military, this lie may have been told to avoid embarrassment, fear, or desire for privacy as opposed to being told for the purpose of obtaining immigration benefits. Thus, the materiality was not clear. Second, the court held that investigation of the lie by the government would not likely have led to information that would have excluded the defendant from citizenship. The fact of the husband serving in the Bosnian military would have affected his citizenship application, but it would not have independently made the defendant ineligible. Accordingly, the court found that failure to provide the materiality instruction was not harmless and vacated the defendant’s conviction.

18 USC § 2260 – Offenses Against Minors

U.S. v. Fortner, 19-3162 (11/25/19)

The defendant was a registered sex offender who attempted to arrange sex with a minor. There was no minor, but instead it was a sting operation. The defendant was convicted of committing a felony offense involving a minor while required to register as a sex offender, under 18 U.S.C. § 2260. The defendant argued on appeal that he

could not be convicted of this offense where there was no actual minor. The court held that § 2260 includes attempts. Thus, the language “involving a minor” includes situations where the defendant attempted to coerce a minor, but no actual minor was involved. As such, the conviction was affirmed.

21 USC § 841(a) – Pill Mills

U.S. v. Godofsky, 18-5450 (11/26/19)

The defendant was a doctor who worked at a pain clinic that the government labelled as a pill mill. During the defendant’s ten month term at the clinic, he wrote thousands of prescriptions for hundreds of thousands of pills. In his prosecution, the defendant argued at trial that subjective good faith was a defense to prescribing outside the course of standard medical practice under 18 USC § 841(a). The district court refused to instruct the jury on subjective good faith, the defendant was convicted, and he appealed. The court held that the legal standard for prescribing narcotics outside of standard medical practice is one of “objective good faith.” The court defined “objective good faith” to mean that it is a defense to the charge if the doctor made an “objective good faith attempt to comply with the law, as measured against the actions of a reasonable doctor under the circumstances, allowing for reasonable mistake or misunderstanding; that is a doctor who acts in accordance with what he [or she] reasonably believed to be proper medical practice.” Although the court noted that the district court’s jury instruction arguably did not fully define this objective good faith standard, the court found that the refusal to provide it did not substantially impair the defense because the defendant could not show that his prescribing practices were objectively reasonable. Thus, the conviction was affirmed.

XIII. Post-Conviction Remedies

U.S. v. Beamus, 19-5533 (11/21/19)

The defendant was convicted in 2002 for distribution of crack cocaine. In 2018, he moved

for resentencing under the First Step Act, which made the reduced statutory penalties of the Fair Sentencing Act retroactive. The district court denied the motion without reaching the merits because it had sentenced the defendant as a career offender. On appeal, the court held that the district court erred in ruling that the defendant was categorically ineligible for relief based on his career offender status. Because the First Step Act changed the defendant's statutory range from 10 to life down to 0 to 30 years, the district court had discretion to decide whether it would lower the defendant's sentence. Accordingly, the case was remanded to the district court to decide in the first instance whether a reduced sentence was warranted on the merits.

Atkins v. Crowell, 18-6012 (12/17/19)

The petitioner was convicted of murder at the age of 16 in Tennessee state court and sentenced to life in prison with parole eligibility after 51 years. The petitioner argued in state court that his sentence violated Miller v. Alabama, 567 U.S. 460 (2012), which held that a mandatory sentence of life without parole for an offender who was under 18 at the time of the crime violates the Eighth Amendment. The state courts rejected the petitioner's claim on the merits. The Sixth Circuit concluded that the state court did not contravene or unreasonably apply Miller in rejecting the petitioner's claim, and as a result the state court ruling was entitled to deference under 28 USC § 2254(d).

Benton v. Brewer, 18-1869 (11/6/19)

The petitioner was convicted by a jury of a sex offense against a child in Michigan state court and sentenced to 25 to 38 years in prison. Prior to trial, the petitioner was offered a plea agreement for one year in prison but rejected it. In post-conviction proceedings, the petitioner claimed that she was entitled to relief under Lafler v. Cooper, 566 U.S. 156 (2012), because she had rejected the plea offer due to ineffective assistance of counsel. The state court ruled that

the petitioner defaulted her claim by failing to raise it on direct review, and further concluded that the claim failed on the merits. The Sixth Circuit concluded that Lafler was not a sufficiently novel ruling to establish cause for the default under Reed v. Ross, 468 U.S. 1 (1984), and further found that the petitioner failed to demonstrate that her appellate counsel had been ineffective for the purpose of establishing cause to excuse her default. The denial of relief was accordingly affirmed.

In re Ohio Execution Protocol Litigation, 19-3064 (12/17/19)

The Sixth Circuit's September 11, 2019 opinion in In re Ohio Execution Protocol Litigation was amended to provide further analysis of the plaintiff's Eighth Amendment claim, but the outcome of the case remained unchanged.